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In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. 539

RESOLUTE INSURANCE COMPANY,

Petitioner,

v.

STATE OF NORTH CAROLINA, EDWIN LANIER, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, UNION COUNTY, and UNION COUNTY BOARD OF EDUCATION,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, which is attached as Appendix A to the petitioner's Petition for Writ of Certiorari, is reported at 395 F. 2d .....

The opinion of the District Court of the United States for the Eastern District of North Carolina, Raleigh Division, which is likewise attached as petitioner's Appendix B, is reported at 276 F. Supp. 660 (ED. of N.C. 1967).

JURISDICTION

The petitioner attempts to invoke the jurisdiction of this Court under Title 28, U.S.C., § 1254(1). The respondents contend that no such jurisdiction exists and that this Court, having once rejected certiorari in this precise matter, should again reject certiorari.

QUESTION PRESENTED

May the Federal District Court entertain a cause to relitigate, on the merits, a case which has been adjudicated in the State Court System and affirmed by the highest Appellate Court of the State upon the mere allegation that there was a denial of due process of law when the question of due process has already been fully adjudicated in the State Court action and the Supreme Court of the United States has already denied Petition for Certiorari from the Supreme Court of North Carolina?

STATEMENT OF FACTS

This action was brought in the Federal District Court by petitioner upon the allegation that jurisdiction was invoked under Title 28, U.S.C., Section 1331 (more than $10,000 in controversy and a question arising under federal laws on the Constitution). Subsequently, the petitioner amended its complaint to allege that there was jurisdiction by reason of more than $10,000 in controversy and a diversity of citizenship between the parties under Title 28, U.S.C., Section 1332.

The plaintiff in its complaint (respondent's Appendix A) sought a permanent injunction against the execution of a judgment entered in the Superior Court of Union County in May of 1965. This judgment, having been appealed by the petitioner to the Supreme Court of North Carolina, was affirmed by that Court in an opinion reported in 266 N.C. 31, 145 S.E. 2d 335.

The petitioner is an insurance company domesticated in the State of Rhode Island with its principal office and place of business in Hartford, Connecticut. It is admitted to do business in the State of North Carolina and is actively engaged in the insurance business in this State, with its major activity being that of becoming surety on criminal appearance bonds. As a requirement of doing business in this State, petitioner is required to deposit securities with the Commissioner of Insurance for the protection of policy-

holders and contract holders in the State of North Carolina and in other states. North Carolina General Statute 58-182.

What the petitioner seeks in its complaint is to permanently enjoin the North Carolina Insurance Commissioner and the Union County Board of Education (the recipient and beneficiary of forfeited criminal bail) from satisfying the judgment on the appearance bonds entered in the Courts of the State of North Carolina. This final injunctive relief is sought even though none of the respondents have ever sought to sell the deposited securities to satisfy the judgment had against the petitioner.

The respondents in their answer to the complaint (Appendix B) allege, among other things, that the District Court had no jurisdiction to entertain the suit, that the matter had already been thoroughly and finally adjudicated in a court of competent jurisdiction, had become *res judicata* and was not subject to the collateral attack of the petitioner.

The District Court, in its opinion, held that the Petitioner had already had its day in court and that the cause had been fairly and finally litigated in a court of competent jurisdiction; therefore, it reasoned, the Court was without jurisdiction to entertain the suit.

The Court of Appeals affirmed the decision of the District Court and departed only to make the obiter comment that the allegations allege bare jurisdiction based upon the diversity of citizenship of the parties. It ruled, however, that there was no justiciable controversy presented by the pleadings. The Court in characterizing the action of the petitioner said it was:

> ". . . a thinly veiled attempt to thwart the process of dispensing justice by relitigating matters which have been decided in a court of competent jurisdiction."

HISTORY OF LITIGATION

This case has a long history of litigation. It had its genesis

in the activities of the petitioner in the writing of criminal bail bonds in the State of North Carolina. The purpose of the litigation is to prevent the execution or satisfaction of judgment in the state court declaring that certain of the petitioner's appearance bonds are forfeited absolutely.

The chronology of events as they have been litigated are as follows;

In 1963, the petitioner, for the usual considerations, became surety on the criminal appearance bonds of certain individuals charged with the crime of kidnapping in the State of North Carolina. The petitioner became surety on these bonds after the individuals had been convicted and pending their appearance to the Supreme Court of North Carolina. The bonds provided that each individual defendant was to:

> ". . . make his appearance at the May 4, 1964 Term of Union County Superior Court and at each succeeding term of said Court pending a final disposition of the above cases, and shall not depart the same without leave of the Court."

The condition of the bonds was such that if the defendants did not appear when called in court the surety (petitioner) became liable on the bonds.

The Supreme Court of North Carolina in the criminal action against the individuals, who were the object of the petitioner's bonds, ruled that there had been systematic exclusion in the grand jury which returned the bills of indictment against the individual defendants, which quashed the indictments, and vacated the judgment in the criminal actions and closed its opinion with these words (STATE v. MALLORY, ET AL, 263 N.C. 536, 139 S.E. 2d 870):

> "The indictments are quashed and the verdict and judgments are vacated for want of valid indictments to support them. It does not follow that defendants are entitled to discharge and dismissal of the charges. If the

State so elects it may send new bills and if they are returned true bills by an unexceptionable grand jury, defendants may be tried thereon for the offenses alleged."

On May 4, 1965, a newly constituted grand jury of Union County returned new true bills of indictment against the individuals who were the subject matter of the petitioner's appearance bonds. The new grand jury was an unexceptionable grand jury which had been revamped in accordance with an order of the Superior Court of Union County. Each of the individual defendants was called out for trial when the new bills of indictment were returned and none of them were present. After the individual defendants were called and failed, the court entered a judgment *nisi* as against each of the appearance bonds in question. At the same time the court ordered *sci fas* to be issued and to be served upon the petitioner's agent and attorney in fact. The record discloses affirmatively that this was done and the petitioner's pleadings admit that their agent and attorney-in-fact was served with the *sci fas* and notice of judgment *nisi*.

The *sci fa* proceeding was all in accordance with the North Carolina statutory provisions providing for the forfeiture of bail in criminal cases (Article 11, Chapter 15 of the General Statutes, 15-100 through 15-122, inclusive).

Under the *sci fas* the surety was ordered to appear and show cause, if any it had, why its bail bonds should not be absolutely forfeited.

At the August 1965 Term of the Union County Superior Court the petitioner appealed through its counsel in response to the *sci fas* served upon its agent and attorney-in-fact, and filed an answer to the *sci fas*. Hearing was duly held in the Superior Court and following the hearing the court entered a judgment absolute on the appearance bonds in question.

The petitioner through its counsel appealed the judgment of the Superior Court of Union County to the Supreme Court of North Carolina alleging, among other things, that it had

been denied the due process of law in that neither the individual defendants nor it had received adequate and proper notice that the defendants were to be at the particular term of court at which they were called and failed. The Supreme Court in an opinion reported in STATE v. RESOLUTE INSURANCE COMPANY AND TIDEWATER BONDING AND SURETY AGENCY, INC., SURETIES, 266 N.C. 31, 145 S.E. 2d 355 (1965) affirmed the judgment of the Superior Court.

The petitioner applied for writ of certiorari to the Supreme Court of the United States from the opinion of the Supreme Court of North Carolina alleging as it had before that it had not received proper notice and that the judgment forfeiting the bonds constituted a denial of due process of law. (See petition for certiorari entitled: MALLORY, ET AL, RESOLUTE INSURANCE COMPANY v. STATE OF NORTH CAROLINA, October Term 1965, No. 1122).

On May 2, 1966, the Supreme Court of the United States denied the petitioner's petition for certiorari as reported in No. 1122, MAE MALLORY, ET AL, PETITIONERS v. NORTH CAROLINA, 384 U.S. 928, 16 L. Ed. 531, 86 S. Ct. 1443.

On October 31, 1967, having been rebuffed on its petition for writ of certiorari, petitioner commenced this civil action in the Federal District Court alleging denial of due process under the Fourteenth Amendment of the United States Constitution and further alleging that the opinion of the Supreme Court of North Carolina was "grossly erroneous". The District Court dismissed the action and the petitioner appealed to the Court of Appeals for the Fourth Circuit. It affirmed the District Court in an opinion decided June 20, 1968.

On September 18, 1968, alleging that it invoked the jurisdiction of the Supreme Court of the United States under Title 28, Section 1254(1), the petitioner filed this, its second petition for certiorari in this matter. This is what now pends before the Court for decision.

THE DECISIONS BELOW

The decision of the Judge of the United States District Court, while recognizing that the pleadings filed always assure the consideration of the Court, ruled that the District Court had no jurisdiction to entertain the petitioner's suit. It ruled that a court of competent jurisdiction had already fully and finally adjudicated the subject matter of the suit. The petitioner had, said the court, failed to show that the court had jurisdiction.

The United States Court of Appeals for the Fourth Circuit on appeal of the decision of the District Court affirmed that Court in all essential matters. It suggested that the pleadings showed bare jurisdiction by the allegation of the jurisdictional amount coupled with diversity of citizenship. Beyond this, however, the Court ruled no justiciable controversy was presented. The Court ruled that the petitioner's action was, in fact, an attempt to have the Federal District Court, in an appellate capacity, review a state court decision alleged to be erroneous. The Court stated that this is not the function of Federal District Courts. Likewise, the Court said that the dismissal was clearly proper on the ground of *res judicata*. Resolute will not be permitted to start all over from an adverse State decision in the hope of working its way through the Federal Court system. The essential contentions of the petitioner, i.e., that no notice was given of the State's intent to reindict the individual defendants, had been decided in the state court. While federal courts may entertain collateral attacks on a judgment of the state court procured through fraud, deception or mistake, such is not the case here.

Finally, the Court below said that the petitioner's action was a "thinly veiled attempt to thwart the process of dispensing justice by relitigating matters . . ." which has been decided in a court of competent jurisdiction.

ARGUMENT

THE PETITION FOR CERTIORARI HAS NO MERIT AND SHOULD BE DENIED.

Two federal courts have reviewed the contentions which the petitioner makes in its petition for writ of certiorari. The District Court concluded in essence that the plaintiff (petitioner) had been provided with its day in court. The claim which the petitioner made, said the District Court, is identical to what was presented before in the State Court system.

The Court of Appeals minced no words when it said that the case was a ". . . thinly veiled attempt to thwart the process of justice . . ." by relitigating matters already decided by a court of competent jurisdiction.

The brief filed by the petitioner in support of its petition for writ of certiorari presents no new argument. It does devote more time to trying to persuade this Court that the Supreme Court of North Carolina was in error in its opinion. This, of course, forms no basis for a federal jurisdiction and adds credence to what the Court of Appeals had to say with respect to this being a thinly veiled attempt to relitigate matters already decided. We would remind the Court in its consideration of the petition for writ of certiorari that it has already denied writ of certiorari in this identical case when the case was being litigated in the state courts and culminated in an adverse decision by the Supreme Court of the State of North Carolina.

An examination of the first or original petition for writ of certiorari shows that it raises essentially the same question presented in the present petition for certiorari: Claimed deprivation of constitutional rights, denial of due process of law and equal protection.

A reading of the factual situation in the State proceedings entitled STATE v. MALLORY, RESOLUTE INSURANCE COMPANY, ET AL, supra, should suffice to allay any doubt but that this case has already been competently and finally adjudicated. The answer filed by the petitioner to the judgment *nisi* and the *sci fas* served upon the company allege that neither the individual defendants nor the petitioner

company were put on notice that the cases would be called at the May 1965 Term of Court. (See page 36 of Vol. 226, North Carolina Reports).

The State Supreme Court in its opinion specifically passed upon the question of notice to the petitioner. The Court said that service of notice of judgment *nisi* upon the attorney-in-fact for the company who had signed the bonds was service upon Resolute, the petitioner in this petition for writ of certiorari.

The Court further noted that the petitioner, through its counsel, had not only made an appearanc in the state court but had filed answer to the notice of judgment *nisi*. The opinion of the Court then discusses the merits of the case and especially the status of an appearance bond after the quashing of a bill of indictment. We need not repeat the rationale of this part of the decision since it is concerned only with a matter of the interpretation of the State law and the contractual obligations created by the bonds into which the petitioner entered. Suffice it to say that the Court ruled contrary to the petitioner's position. This adverse ruling resulted in the first petition for certiorari which proved to be fruitless.

In order to bring the subject matter of this petition for certiorari and the subject matter of this litigation into proper focus, the respondents point out that the relief which the petitioner seeks is a permanent injunction against the operation of a valid judgment entered in the Courts of the State of North Carolina and reviewed by the highest court of that State. Petitioner's argument that it is seeking only injunctive relief makes rather lightly of what would be a final disposition of the case in its favor. Such a disposition would necessarily involve a decision on the merits of this case in direct conflict with the opinion of the North Carolina Supreme Court. The two federal courts below, being fully cognizant of the posture of the case, have wisely and rightfully declined jurisdiction.

The respondents likewise wish to remind the Supreme

Court that they have rights and remedies which have been postponed and needlessly delayed by the prolonged litigation made necessary by the petitioner's insistence of having his day in court on two occasions in a dual system of courts. More than three years have elapsed since the state court entered a judgment absolute on the solemn obligations of the petitioner to see that certain defendants appeared in Court. The schools of Union County, North Carolina, the respondent rightfully entitled to the money declared forfeited, can put the money in question to very good use. Part of the remedy to which the respondents are entitled is an end to the unjustified delay of this case.

The thrust of the petitioner's brief in support of the petition for certiorari seems to be that the federal courts have the power to enjoin proceedings in state courts and likewise to enjoin the orders and judgments of state tribunals. The respondents concede this power and the application of it under certain well-defined and limited circumstances. Such circumstances as would empower and justify a federal court into interceding and enjoining the execution of a valid state judgment simply do not exist in this case. It is hard to conceive of any matter in litigation for which it could not be claimed that the United States Constitution or some federal law is involved. Indeed, in this case the due process claimed seems to come as an after thought to adverse judgments and decisions.

It is the respectful contention of the respondent that the judgment of the state court in this case constitutes *res judicata*. It is the duty of a federal court upon allegations of jurisdiction to examine the pleadings to see if a substantial federal question is present, AMERICAN TRAVELERS CLUB, INC. v. HOSTETTER, 219 F. Supp. 95, and the Court will look beyond the mere verbiage of the complaint in determining this. TRAUSS v. PHILADELPHIA, 159 F. Supp. 95; POSS v. LIEBERMAN, (CA N.Y.) 299 F. 2d 358. Doubts as to federal jurisdiction must be resolved against it. STRUCTURAL STEEL & FORGE CO. v. UNION PACIFIC R.R., 269 F. 2d 714, cert. den., 361 U.S. 886, 4 L. Ed. 2d 121, 80 S. Ct. 157.

In the case at hand, the state courts have litigated fully the issues as between the parties. The burden of relitigation cannot now be shifted to the federal courts. The respondents are entitled to have an end to this litigation. The federal courts are entitled to have matters within the competence of state courts remain there.

In 50 C.J.S., JUDGMENTS, § 899, the doctrine of *res judicata* as between state and federal courts is treated in the following language:

> "Res judicata applies as between federal and state courts, so that a final judgment in one is conclusive in the other as to the same cause of action. Federal courts are required to give full faith and credit to judgment of other federal courts."

In HUDSON, ET AL v. LEWIS, ET AL, (CA 5, 1951) 188 F. 2d 679, cert. den., 72 S. Ct. 79, 96 L. Ed. 642, plaintiffs had brought an action in the state courts of Mississippi to quiet title to 360 acres of oil bearing land. A judgment adverse to plaintiffs was entered. Plaintiffs then brought action in the Federal District Court alleging, among other things, that the proceeding in the state court denied them of due process of equal protection of the laws and that therefore the state court was without jurisdiction. From a summary judgment dismissing the suit plaintiffs appealed.

The plaintiffs in the state proceeding had appealed to the Mississippi Supreme Court and, from an affirmance, applied for certiorari to the Supreme Court of the United States.

In affirming the summary judgment the Fifth Circuit Court said:

> "If this pattern, whereby plaintiff seeks on constitutional grounds to obtain two trials on the same issues, first in the state court and, if a loser there, next in the federal court, is to become established, the state courts will sink into an insignificance and obscurity not here-

tofore dreamed of by the greatest partisians, the most extreme advocates of the extension of federal power. No case has been, nor, so long as our federal system continues, can be, cited in support of such an extreme doctrine of the futility and impotence of state courts, their complete subordination to the super sovereignty of federal courts.

"Quite the contrary of the pitifully subservient place in our judicial system afforded by appellants to state courts by their claim under the facts, federal and state courts alike have spoken and will continue to speak, without dissentient note in one clear strain. *This is to the effect that where a court, whether state or federal, acts within the competence of its jurisdiction, no other court may collaterally attack its judgment.* (Emphasis added)

". . . . We are in no doubt therefore that the claims of appellants that, for the reasons they assign, the judgment was subject to collateral attack, are completely without basis; that the district judge was right in receiving the judgment as res judicata and refusing to permit relitigation and re-examinating of the question it had determined."

In a recent North Carolina decision, COBB v. CLARK, 257 F. Supp. 175, (D.C. N.C., 1966), the District Court for the Middle District of North Casolina cited the HUDSON case, supra, with approval with this statement:

"It is universally held that matters and things determined and adjudged against a plaintiff in a court 'having jurisdiction of persons and subject matter, may not be again litigated by plaintiffs against the same persons in a federal court of that state.' (Citing cases). The rule is succinctly stated in DAVIS v. ANDERSON INDUSTRIES, INC., quoting from MARSH v. ATLANTIC COAST LINE RR CO., 151 NC 160, 65 S.E. 911 as follows:

'Before the plaintiff brought her action in this court, she had had her full day in the courts of the State of North Carolina, "the judgments of which whether right or wrong, are not subject to review by the United States District Court" . . .'" WATSON v. SUDDOTH, 8 cir., 177 F. 2d 371.

The Court went on to say that the doctrine of *res judicata* is applicable not only to all matters actually presented at the trial but also to every ground which might have been presented. MOORE v. HARKINS, 179 NC 167.

The cases are legion in support of the common-sense proposition that adjudication by a court of competent jurisdiction is *res judicata* to all courts. This applies alike to State-Federal Courts within the framework of a federal system.

In the absence of a showing of fraud, accident, or mistake, which deceived the court into a wrong decree, the federal courts have no jurisdiction to try a cause already litigated in a state court. Thus, in CHANDLER v. BROWN, 282 F. 2d 186, (CA 5, 1960), the court in stating the rule said:

"There being no issue as to what transpired in the Texas trial court, and the appellate courts of Texas having affirmed what was done by the trial court and having rendered judgment prior to the one here appealed from, the state court proceedings are res judicata of all of the questions raised by the appellant here. A good statement of the rule is set forth in COMMISSIONER OF INTERNAL REVENUE v. SUNNEN, 1948, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L. Ed. 898:

'The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the

suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' "

Again in MANUFACTURER RECORD PUBLISHING COMPANY v. LAUER, 268 F. 2d 187, the court said:

"A federal court . ... has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, while cases of the latter class invoke a jurisdiction which does not exist, a jurisdiction in a federal court to review and revise the acts and decisions of courts of competent jurisdiction upon questions which they have lawfully considered and adjudged. (Citing cases). The decree of the state court is therefore valid, and must be enforced and respected, unless the complaintant has pleaded facts evidencing such a fraud as will warrant a disregard of it."

In McCARTHY v. WOOD, 245 F. 2d 853, (CA 5, 1957), plaintiff sought to nullify a state court decision upon the allegation that it was secured by fraud and ill practice. In dismissing the suit, the Fifth Circuit Court said:

"A reading of the opinion of the Supreme Court of Louisiana leaves no room for doubt that this is so and that this suit presents nothing either more or less than an effort of a litigant who is dissatisfied with the decisions of the state courts to retry in the federal court issues decided against him in those courts not only once but several times. It is settled law that he cannot do this. The judgment was right. It is affirmed."

In the recent case of DEANE HILL COUNTRY CLUB,

INC. v. CITY OF KNOXVILLE, 379 F. 2d 321, (CA 6, 1967), the plaintiff filed a complaint in the federal court claiming as the basis of jurisdiction Title 28, U.S.C., § 1343. The complaint charged that plaintiff's property as a result of annexation had been subjected to liens for the payment of city taxes because of an annexation proceeding by the City. It further alleged that the ordinance and statute in question deprived plaintiff of property without due process of law in that the plaintiff was not represented before the City Council, which enacted the annexation ordinance. The City made a motion to dismiss in the District Court on the grounds that the plaintiff had commenced an action in the state court in 1960 for the purpose of voiding the annexation ordinance in question. The state court had sustained the City's demurrer, which raised many of the constitutional issues presented in the plaintiff's complaint.

The Sixth Circuit Court in affirming the judgment of the District Court which dismissed the complaint said (p 325):

> "State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts."

The plaintiff, as in the case at hand, had appealed the decision of the state court to the Supreme Court of Tennessee, where it had been affirmed. Likewise, as in this case, the plaintiff had applied for certiorari to the United States Supreme Court and it had been denied. The Court in addressing itself to the effect of the rejection of certiorari by the United States Supreme Court, agreed with the plaintiff that denial of certiorari does not make the lower court's decision the law of the Supreme Court. However, the Court said:

> "While this is of course true with respect to the value of the case as precedent, the relevant fact here is that the parties have had their day in court and the denial of certiorari merely signifies that appellate review has been exhausted."

In LAVASEK v. WHITE, 339 F. 2d 861 (CA 10, 1965) the plaintiff brought an action against state officials alleging deprivation of property through use of procedures in violation of the Fourteenth Amendment. The District Court Judge entered a judgment dismissing the complaint and the plaintiff appealed. The case concerned a condemnation proceeding against land owned by the plaintiffs. The asserted rights of the plaintiffs affected by the condemnation were fully litigated in the State Courts, culminated in a decision by the New Mexico Supreme Court. The decision by the New Mexico Supreme Court was adverse to the plaintiffs. Jurisdiction, as is the case here, was alleged under Title 28, U.S.C., § 1331, the plaintiff alleging deprivation of property through procedures violative to the Fourteenth Amendment. The Court of Appeals in affirming the dismissal said:

> "The cause was properly dismissed. Appellants were fully heard in the state court action, and they now have no remedy in a federal district court. The state court had jurisdiction of such matter and of the parties; no more is required to make the judgment conclusive . . . Nor does the appellants claim of a denial of constitutional rights alter the situation. As was stated by the United States Supreme Court in ROOKER v. FIDELITY TRUST CO., 263 U.S. 413, at 415, 44 S. Ct. 149, at 150, 68 L. Ed. 556:
>
> > 'If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication.' "

For other cases holding that the federal courts have no jurisdiction to review the decisions of state courts see: WIL-

LIAMS v. TOOKE, ET AL, 108 F. 2d 758 (CA 5, 1940), cert. den., 61 S. Ct. 8 L. Ed. 419; CAROLINA-VIRGINIA RACING ASSOCIATION v. CAHOON, 214 F. 2d 831 (CA 4, 1954); DRAWDY INVESTMENT COMPANY v. LEONARD, 261 F. 2d 226 (CA 5, 1958); STAFFORD v. SUPERIOR COURT OF CALIFORNIA, 272 F. 2d 407, cert. den., 362 U.S. 979, 4 L. Ed. 2d 1013; ENGLEHARD v. SCHROEDER, 278 F. 341 (CA 3), aff., 258 U.S. 610, 42 S. Ct. 382.

PETITIONER MAY NOT COLLATERALLY ATTACK THE JUDGMENT OF THE STATE COURT.

The petitioner may not collaterally attack the judgment of the state court. As an adjunct to the doctrine of *res judicata* the doctrine of collateral attack prevents the petitioner from asserting the invalidity of a judgment regularly had in the state court. This doctrine may be called a corollary to *res judicata* and is so well established that an exhaustive citation of authority is not required. Notable among these decisions are: PRICHARD v. NELSON, (D.C. VA.) 55 Supp. 506, affirmed (CA 4) 137 F. 2d 312; TURNER v. ALSTON BANKING & TRUST CO., (CA 8) 181 F. 2d 898, cert. den., 71 S. Ct. 66, 340 U.S. 833, 95 L. Ed. 885; MANNING v. STATE FARM MUTUAL AUTO INS. CO., (D.C. N.C.) 235 F. Supp. 615; BRYAN v. BRYAN, (D.C. S.C.) 109 F. Supp. 366; MIDESSA TELEVISION CO. v. MOTION PICTURES FOR TELEVISION, INC., (CA 5) 290 F. 2d 203, cert. den., 82 S. Ct. 47, 368 U.S. 827, 7 L. Ed. 2d 30.

In the BRYAN case, supra, Judge Williams of the District Court of South Carolina, in an opinion dismissing the complaint and injunction said (p 371):

> "I do not think the plaintiff in this case has been denied due process of law. The courts of our state have carefully considered all his complaints and have ruled adversely against him. Under these circumstances, no other conclusion can be reached than that the plaintiff has not been denied due process of law. This principle is clearly stated in the case of McDONALD v. OREGON

RR & NAVIGATION CO., 233 U.S. 665, 34 S. Ct. 772, 58 L. Ed. 1145 . . ."

In MIDESSA, supra, the Court stated the doctrine of collateral attack as follows (p 244):

> "Plaintiff relied below and relies here on the established rule that in a suit on a judgment of a state court, predicated on proper jurisdiction over the subject matter and person, as was the case here . . . the judgment is not subject to collateral attack. RIPLEY FABRICS CORP. v. HYMEN, D.C. 91 F. Supp. 1007; MILLIKEN v. MEYER, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278; MORRIS v. JONES, 329 U.S. 545, 67 S. Ct. 451, 91 L. Ed. 488."

We do not understand the petitioner to take the position that the judgment against it was procured by fraud, mistake, etc. Rather, petitioner says it was denied due process of law and that the state court had no jurisdiction. Of course, the petitioner's own complaint pleads service of *sci fas* upon the agent-in-fact of the Resolute Insurance Company. Additionally, the papers attendant to the state action will show that petitioner was aptly notified of the proceeding and, through counsel, appeared in Court, filed an answer to the *sci fas* and appealed from an adverse judgment to the Supreme Court of North Carolina. If this does not invoke the doctrines of *res judicata* and its corollary principle, collateral estoppel, then, we confess a want of understanding of those principles.

The cases cited in petitioner's brief are not apposite to the question here presented. GRAY v. SAUNDERS, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, was a case initiated in the federal court on original jurisdiction. The suit was brought to restrain the State of Georgia from using a county unit system in Democratic primaries. It was a case before a three-judge court.

GOMILLION v. LIGHTFOOT, 364 U.S. 346, 81 S. Ct. 124, is a civil right case initiated by negroes in the federal court

to enjoin the Alabama Legislature from changing the boundary lines of the City of Tuskegee on allegation that it would eliminate several negro voters. Title 28, U.S.C., §§ 1331 and 1332, were not involved in the case.

ESSANAY FILM MANUFACTURING COMPANY v. KANE, 258 U.S. 358, 42 S. Ct. 318, 66 L. Ed. 658, stands for the proposition that a suit in the federal court to enjoin proceedings in the state court will not lie on grounds that the attempted service of process by the defendant was lacking in due process of law. The court said that the federal courts could not stay proceedings in a state court and that defendant's remedy was to seek direct review in the Supreme Court. MARSHALL v. HOLMES, in an 1891 case, reported in 141 U.S. 589, 12 S. Ct. 62, 35 L. Ed. 870, the defendant sought a removal of the case from the state to the federal court and sought to enjoin the execution of judgments obtained in the state court. The petitioner alleged that the judgments in the state court were obtained by perjury and forged documents. The Supreme Court held that the Circuit Court could restrain the execution of judgments so obtained in the state court were there a diversity of citizenship. The case went off on the fact that the judgments were obtained by fraud.

In ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. WELLS, 265 U.S. 101, 44 S. Ct. 68 L. Ed. 928, the defendant sought to enjoin judgments rendered in a state court where the plaintiff had sought to serve the defendant by serving a writ of garnishment on a Texas railroad company, whose line connected with the Santa Fe. Santa Fe did not appear and default judgments were taken. The Supreme Court held that there was no jurisdiction in the case, that defendant was a Kansas corporation not admitted to Texas as a foreign corporation, and that it had not consented to be sued there, had no agent there, and owned no railroad within the state. The *judgments constituted an unreasonable burden on Interstate Commerce and the garnishment was void.* (Emphasis added)

In SIMON v. SOUTHERN RAILWAY, 236 U.S. 115, 35

S. Ct. 255, 59 L. Ed. 492, plaintiff brought suit to enjoin the enforcement of a judgment obtained in the state court. Plaintiff alleged that the judgment was obtained by fraud. Service on the defendant had been attempted by serving the Assistant Secretary of State of Louisiana under state statute. The Supreme Court held that there was no valid service of process under the Louisiana statute because it did not provide for service on the Assistant Secretary of State.

In the case of GREYHOUND CORPORATION v. LEADMAN, 112 F. Supp. 237 (E.D., KY., 1953), the plaintiff, bus company, invoked the jurisdiction of the District Court under Title 28, Section 1332, contending that there was diverse citizenship as between it and all of the defendants. The action was to enjoin judgment rendered in the State Court of Kentucky in the amount of $15,000. The plaintiff contended that the judgment was null and void because no summons had ever been served on the plaintiff, or on its process agent, or upon any officer of the plaintiff corporation. Contrary to what the petitioner cites the case for, the District Court went on to say that it did not have jurisdiction over the case and it concluded as a matter of law that there was no denial or impairment of the plaintiff's constitutional rights. It likewise concluded as a matter of law that the enforcement of the judgment would not be unconscionable and that the plaintiff's claim was insufficient to bring it within any of the exceptions of Title 28, U.S.C.A., Section 2283. The Court went on to say that since the basis for the plaintiff's claim is an exception to the statute (Title 28, U.S.C.A., Section 2283) it had the burden to establish the facts necessary to bring itself within the exception relied upon, citing FEDERAL TRADE COMMISSION v. MORTON SALT COMPANY, 334 U.S. 37, 69 S. Ct. 822, 92 L. Ed. 1196.

OSTROFF v. JOHNSON, ET AL, 78 F. Supp. 718 (D.C., N.J., 1948) likewise has no connection whatsoever with the cause under consideration. In that particular case plaintiff brought an action in the Federal District Court on the basis of diversity of citizenship as between the parties. An examination of the factual situation set forth in the OSTROFF de-

cision, supra, plainly shows that it is in no way kin to the factual situation presented in the petitioner's petition for writ of certiorari. The allegations of the plaintiff in that case dealt with fraudulent attempts to collect a state judgment. This is not a contention of the petitioner here; and, in fact, it does not allege that any attempt has been made to enforce the judgment.

Again, respondents emphasize that while the allegations in the complaint might be conceived to state a cause of action because of the allegation of diverse citizenship as between the petitioner and the respondents, the court below properly ruled, after examining all of the pleadings, that no justiciable controversy existed. The attempt of the petitioner to dress up an old cause of action with new adjectives by saying that the judgment procured in the state court ". . . shocks the conscience of equity, fair play and due process . . .", is the thin veil of disguise which thhe court below found to exist.

The petitioner's solemn obligation under the contract into which it entered was to keep up with the several boundened defendants and to have them before the court for trial. In accepting this obligation it received therefor good consideration. Furthermore, the facts in this case positively show that its attorney-in-fact was served with notice of the judgment *nisi* and with the *sci fas*. Petitioner was ably and fully represented by counsel at all stages of the proceeding.

What really shocks the conscience of the petitioner is its impending loss of money occasioned by the forfeiture of its bail bonds which are really lost because of the lack of diligence on the part of petitioner in its commercial venture. When the petitioner entered into the criminal bail bond business in the State of North Carolina, it did so with full knowledge and contemplation of the laws of this State and the business risk involved in becoming surety for accused persons. Now that it is called upon to make good on its solemn obligations it professes ignorance and shock and utters forth platitudes which it hopes will persuade this court to grant it a writ of certiorari to the end it may reverse a lawful judgment had in a court of competent jurisdiction.

In this type of litigation, as in most litigation, there are rights of both parties to be considered. In the case at hand, the petitioner has succeeded in frustrating that justice to which the respondents are entitled. The respondents, and especially the school board of Union County, are entitled to have these forfeited bonds added to the school fund. This is a substantial and lawful right which has been gained through the full exercise of procedural and substantive due process of law.

In the case at hand, the petitioner has been accorded the full measure of due process of law in the usual and prevailing sense of the term. Petitioner has had its "day in court" with all that is implied therein. It has been represented every step along the road of due process by able and competent counsel. It has now come to the end of the road where it must pay in accordance with the tenor of its solemn obligation.

The respondents respectfully pray that this Court again deny the petitioner's petition for writ of certiorari to the end that this litigation may be finally and lawfully terminated.

Respectfully submitted,

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